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No. 93-1197

In The

Supreme Court of the United States

October Term, 1994

ALBERT HESS,

Petitioner,

- against -

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

- against -

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF OF PETITIONERS

Of Counsel
PROFESSOR DAVID J. BEDERMAN
Gambrell Hall
Atlanta, Georgia 30322

LAWRENCE A. KATZ
(Counsel of Record)
JOSEPH A. COFFEY, JR.
COFFEY & KAYE
718 Two Bala Plaza
Bala Cynwyd, Pennsylvania 19004
(610) 668-9800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

I. BECAUSE THE CONSTITUTIONAL PRESUMPTION IS THAT INTERSTATE COMPACT ENTITIES DO NOT HAVE ELEVENTH AMENDMENT IMMUNITY ABSENT A CLEAR STATEMENT BY THE STATE PARTIES IN THE COMPACT INSTRUMENT, AS DELIBERATELY CONSENTED TO BY CONGRESS, AND BECAUSE THE COMPACT INSTRUMENT HERE REVEALS THAT PORT AUTHORITY/PATH WAS INTENDED BY THE STATES AND CONGRESS TO BE AKIN TO A POLITICAL SUBDIVISION THAT DOES NOT HAVE ELEVENTH AMENDMENT IMMUNITY, THE PORT AUTHORITY IS AMENABLE TO SUIT IN FEDERAL COURT.

It bears repeating that the narrow question presented by this Petition, as articulated by the Court itself in its Order granting certiorari, 114 S.Ct. 1292, is whether the Port Authority of New York and New Jersey (and its subsidiary, PATH) has immunity from suit in federal court under the Eleventh Amendment. It also bears repeating that these cases do not involve an entity created by a single state. The Port Authority is a bi-state entity created by an interstate compact, sanctioned under Article I, Section 10, Clause 3, of the Constitution. Petitioners submit that this Court's decision need only focus on the particular character of the Port Authority/PATH as an interstate compact entity, and that such an approach is perfectly consistent with the wider body of this Court's Eleventh Amendment jurisprudence as reflected in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440

U.S. 391 (1979). No new or expanded Eleventh Amendment doctrines need to be created for the resolution of this case.

A. A Textual Examination Of The Compact Creating The Port Authority Reveals No Intent To Endow It With Eleventh Amendment Immunity, And In Fact Evidences An Intent To Create An Entity Akin To A Political Subdivision That Has No Eleventh Amendment Immunity. Subsequent State Pronouncements And Judicial Decisions Cannot Modify The Compact Instrument.

Petitioners have already explained how a fair reading of the Compact creating the Port Authority/PATH is highly suggestive of the conclusion that the state parties and the consenting Congress intended that the Port Authority/PATH be considered an entity akin to a political subdivision which does not possess Eleventh Amendment immunity. Similarly, nothing in the Compact instrument reveals any intent by the compacting states or Congress to grant the entity immunity in federal courts.

As noted in our opening Brief, the Compact between New York and New Jersey calls the Port Authority/PATH, a "body corporate and politic." This Court has recognized that this term refers to a local government or municipal corporation and not to a state. Decisions of the state courts of New York and New Jersey, contemporary with the drafting of the Compact, also demonstrate that the compacting states recognized that the legal terms-of-art used in the Compact applied to local governments and municipal entities and not to states. An examination

of the Eleventh Amendment and its history also leads to the conclusion that "bodies corporate and politic" were not intended to be afforded Eleventh Amendment protection. A review of the legislative history of Congress' consent to the Compact also reveals the understanding by Congress that the entity was not to be afforded protection from suit in federal courts. Consistent with these numerous sources is the Port Authority/PATH's own statement, contained in its legally mandated Comprehensive Report (Pet. for Cert. App. 59a), that it is a political subdivision. This textual evidence is bolstered by the fiscal structure of the Port Authority/PATH and its autonomous nature. *Pet. Br.* 17-26.[1]

Nowhere does Respondent seriously dispute these characterizations. Nor does it deny that, at best, the Compact is silent as to the matter of the Authority's Eleventh Amendment immunity. Respondent relies instead on a

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[1] PATH's self-characterization as a "political subdivision" is contained in its Comprehensive Financial Reports. *See, e.g.*, Report for the Years Ending December 31, 1991 (Pet. for Cert. App. 59a) and December 31, 1992 (*Br. Pet.* at n.2). It is interesting that PATH knew the significance of its status as either a state-entity or a political subdivision at least as early as 1989, when the Second Circuit Court of Appeals rendered its decision in *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990). That decision recognized that the threshold question before it, in determining whether PATH was entitled to Eleventh Amendment immunity, was whether PATH was more akin to a state or to a political subdivision. *Id.* at 873 F.2d 630. Despite its knowledge of the significance of the language used to describe the Port Authority/PATH, it continued to describe itself using language that rendered it unable to invoke the Eleventh Amendment.

number of state law decisions characterizing the Port Authority/PATH as a state instrumentality. It also impliedly depends on the favorable representations made by the States of New York and New Jersey in this litigation. In short, Respondent hangs its argument on interpretations of the Compact made by the state parties well after it was adopted. These post-Compact statements of intent and application, even if well-reasoned and not self-serving, see *supra* at n.1, can have no bearing on the matter at hand absent some indication that the States intended and Congress had formally consented to the grant of Eleventh Amendment immunity at the time the Compact was considered. Eleventh Amendment immunity must be bestowed by the states and Congress in the compact; it is insufficient that the compacting states later decide to grant such immunity or that state courts act under a fiction that it was in fact originally bestowed.

B. There Is No Presumption Of Eleventh Amendment Immunity For Interstate Compact Entities, And States Cannot Implicitly Endow Interstate Compact Entities With Eleventh Amendment Immunity Because The Compact Clause Represents, As Part Of The "Plan of the Convention," A Derogation Of State Sovereignty.

One thrust of Respondent's (and its amici's) arguments is that, contrary to this Court's holding in *Lake Country*, 440 U.S. at 401, interstate compact entities are assumed to possess Eleventh Amendment immunity. They argue that this assumption negates the need for the finding of specific intent to confer Eleventh Amendment immunity in the compact instrument. *Amicus Br. of Council of State Gov'ts*, at 12-18. Petitioners submit that this

argument represents a gross distortion of this Court's Compact Clause jurisprudence and is potentially destructive of the delicate balance of federalism that Respondent so fervently invokes. Once the error of Respondent's argument becomes apparent, it follows that absent a clear statement of original intent by the compacting parties and by Congress concerning the Eleventh Amendment immunity of a bi-state entity, it should be presumed not to have such immunity. The Port Authority (and thus its subsidiary, PATH) does not have, and never has had, any immunity from suit in federal court.

Respondent begins with a well-accepted point: the Eleventh Amendment is a broad vindication of state sovereignty, and the Amendment itself sets forth a doctrine that had been accepted when the Constitution was adopted. Petitioners have no difficulty with these propositions. But, Respondent goes on to suggest that the Amendment was intended to prevent any federal judicial interference with state government. Because, Respondent reasons, bi-state entities are creatures of state government (having been created by states) they are likewise presumptively immune from suit in federal court.

Respondent's contention has a fatal constitutional flaw. Bi-state entities are not entitled to a presumption of Eleventh Amendment immunity because they are *not* the creatures of the compacting States. They are possible only by virtue of the federal Constitution and the consent of the federal Congress. As has been repeatedly noted in the decisions of this Court, under the Compact Clause, the states of the Union gave up their sovereign right and power to conclude agreements amongst themselves,

agreements that could create legal effects and consequences extending not only within the sovereignty of the effected states, but also beyond to neighboring states and into the realm of federal legislation and power. *See, e.g., New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (particular concern of the Compact Clause was to condition congressional consent for those agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.") (quoting *Comm. of Virginia v. State of Tennessee*, 148 U.S. 503, 519 (1893)); *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209-10 (1837); *Wilson v. Mason*, 5 U.S. (1 Cranch) 45, 92 (1801) (where Chief Justice Marshall raised the concern that, absent the Compact Clause, "two states might, by agreement between themselves, annul the Constitution of the United States."). *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States*, § 1403, at 264 (T. Cooley ed. 1873) (Compact Clause drafted "in order to check any infringement of the rights of the national government.").

In requiring states to obtain congressional consent to any compacts, the Compact Clause implicitly acknowledges both the unique position of such compacts in the federalist structure and the supreme sovereignty of the federal government. In fact, this Court has noted that congressional consent was required by the Framers "to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). "A compact entered is an obligation which, as

long as it exists, diminishes the freedom of the state to act independently in a particular sphere of interest . . . . " Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 298 (1971).

It is undoubted that the Compact Clause represents a relinquishment of state power as part of the "plan of the Convention." *See Edelman v. Jordan*, 415 U.S. 651, 661 n.9 (1974); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 310 (1990) (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J., concurring in part and concurring in the judgment); and cases cited at *Pet. Br.* 14. The very text of the Constitution notes the primary concern that Congress must consent to agreements coming within the scope of the Compact Clause. But, more than that, one state party to a compact relinquishes sovereignty to its partners. After all, one state cannot (in the case of a compact creating an entity or authority) change or subvert the purposes or functions of the institution without the consent of the other compact parties. One state cannot pursue its sovereign goals through a bi-state agency without the permission of the other. *See Olin v. Kitzmiller*, 259 U.S. 260, 263 (1922); cf. *Henderson v. Delaware River Joint Toll Bridge Commission*, 362 Pa. 475, 487-88, 66 A.2d 843, 849-50, *cert. denied*, 338 U.S. 850 (1949).

Lastly, it is now indisputed that interstate compacts are federal, not state, law. *See Cuyler v. Adams*, 449 U.S. at 439 n.7; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851) ("This compact, by the sanction of Congress, has become the law of the Union."). The interpretation of interstate compacts present federal questions. *See Delaware River Joint Toll Bridge Commission of Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419, 427-28

(1940). They are to be construed as federal statutes, using principles of statutory interpretation as necessary, although state law may be relevant (as here concerning the meaning of the Compact's designation and characterization of the Port Authority as a "body corporate and politic") for a court to better understand the words and terms used in the compact instrument. To the extent that this Court has federalized the interpretation of multi-state compacts, it recognizes a further derogation of state sovereignty under the Compact Clause.

Since states creating compact entities do not possess their full sovereignty in these vital respects, they cannot implicitly endow the created entity with Eleventh Amendment immunity, a signal attribute of their own constitutional sovereignty. To argue, therefore, that bi-state entities are automatically endowed with an essential attribute of state sovereignty – Eleventh Amendment immunity – is to argue without a constitutional foundation.

C. Maintenance Of The Delicate Federal Balance Requires That Compacting States Specifically Endow, And Congress Explicitly Concur With, A Bi-State Entity's Eleventh Amendment Immunity At The Time The Compact Is Created And Congressional Consent Is Given.

The better-reasoned position must be that interstate compact entities are not presumed to possess Eleventh Amendment immunity, but that it is within the power of the compacting states to grant immunity from suit in federal courts to bi-state agencies. This must be done explicitly and with the express consent of Congress; it

must appear on the face on the compact instrument that is approved by Congress.

The wisdom of this position is revealed by noting a dispute not directly implicated in this case: whether Congress truly has the power to amend or revise an interstate compact once it has given its consent, or otherwise to regulate the activities of interstate compact entities. Although some authorities suggest that technical amendments to compacts need not be referred back to Congress for approval, *see, e.g., Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 391, 190 N.E.2d 402, 406, 240 N.Y.2d 1, 7 (1963); *Henderson*, 362 Pa. at 484-85, 66 A.2d at 848, the question whether Congress may affirmatively seek to subsequently modify a compact has yet to be settled.

The stated position of the Port Authority/PATH is, however, that once Congress adopted its Compact in 1921 and 1922, the Authority was then free to enlarge or change the scope of its activities without the need for any subsequent congressional concurrence. Indeed, Respondent has asserted that Congress is simply powerless to interfere in its activities. *See United States v. Tobin*, 195 F. Supp. 588, 595 (D.D.C. 1961), *rev'd*, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); Inquiry Before Subcommittee No. 5 of the House Committee on the Judiciary on the Return of Subpoenas, Port of New York Authority, 86th Cong., 2d Sess., ser. 20, at 16-19 (1960). As of the time of the Tobin litigation, in which the Executive Director of the Port Authority defied a congressional subpoena pursuant to an investigation of the Authority's activities, the Authority had purported to make twenty-six augmentations to its powers without seeking consent

by Congress. *See* Brief of Appellant at 6, *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962) (No. 16604), *cert. denied*, 371 U.S. 902 (1962). See also Emanuel Celler, Congress, Compacts, and Interstate Authorities, 26 *Law & Contemp. Probs.* 682 (1961); Note, Congressional Supervision of Interstate Compacts, 75 *Yale L.J.* 1416, 1427 n.66 (1966).

Compacts which create bi-state or multi-state agencies pose a special challenge to the underlying premise of the Compact Clause. These entities have proliferated in this century, the New York Port Authority being just the first of them. Such authorities are organic entities, capable of change and growth. This is as it should be. The problem arises when, precisely as here, an interstate compact agency purports to arrogate powers without subsequent congressional consent. In this case it is the claim of the Port Authority/PATH to Eleventh Amendment immunity. The rule must be that Congress must specifically approve such a grant of immunity so that the Eleventh Amendment, a constitutional grant of immunity to a narrowly defined class of defendants, is not inappropriately extended.

Petitioners are not suggesting that all subsequent modifications and augmentations of the powers of interstate compact entities be ratified by Congress. Such a result would be unnecessary. But when the states wish to create an interstate compact agency, and to endow it with their Eleventh Amendment immunity, it is incumbent upon them to make their intent clear via a plain statement to that effect in the compact instrument, and to secure congressional consent to such a grant. As for compact entities already in existence, all the states need do

(assuming they, in fact, desired the relevant entity to have Eleventh Amendment immunity) is to seek congressional consent for an amendment to the compact, reflecting such a desire.[2]

In the case of the Port Authority/PATH, no original intent to confer Eleventh Amendment immunity is contained in the Compact instrument nor has this intent been declared by a congressionally approved amendment to the Compact. In fact, the language of the Compact reflects that the states and Congress intended that the Port Authority/PATH be considered akin to a political subdivision and that it not have Eleventh Amendment immunity. *Br. Pet.* at 13-27.

II. PATH CANNOT INVOKE THE PROTECTION OF THE ELEVENTH AMENDMENT BECAUSE A JUDGMENT AGAINST PATH WILL NOT HAVE ESSENTIALLY THE SAME PRACTICAL CONSEQUENCES AS A JUDGMENT AGAINST EITHER NEW YORK OR NEW JERSEY.

The Port Authority/PATH cannot invoke the Eleventh Amendment's protection because the language contained in its Compact evidences the clear intention of the

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[2] The Respondent (and its amici) have argued that the absence of Eleventh Amendment immunity will stifle their use of such bi-state entities as "social laboratories" and will limit their use of such entities in their attempts to find "innovative" revenue-raising tools. Neither argument is valid. No state policy will be thwarted as long as the states and Congress explicitly set forth, in the compact (or an amendment thereto if an existing entity), their intention to confer Eleventh Amendment immunity on said entity.

States of New York and New Jersey, as well as Congress, that it be treated as a political subdivision or municipality and not a State. While the fiscal structure of the Port Authority/PATH need not be analyzed because of the overwhelming textual evidence, it does provide further support for the conclusion that the Port Authority/PATH is not entitled to Eleventh Amendment immunity. The Port Authority/PATH is financially self-sustaining and its debts cannot become the liability of either compacting state. *Pet. Br.* at 34-38.

A. The "Impact On State Treasury Test" Is The Appropriate Analysis To Be Used If The Compact Language Does Not Clearly Reflect The Intentions Of The States And Congress.

If this Court believes that the Compact is not sufficient to ascertain Congress' and the states' intention, then the Court should apply the "impact on state treasury test." That test will also lead to the conclusion that the Port Authority/PATH is not entitled to Eleventh Amendment immunity.

The test, as re-stated in *Lake Country*, 440 U.S. at 400-01, is that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same consequences as a judgment against the State itself." [citing at 440 U.S. at n.15, *Edelman*, 415 U.S. 651 (1974) and *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459 (1945).]

Respondent suggests that this test is inappropriate. Their criticism is unfounded. First, this test is true to the

historical purpose of the Eleventh Amendment which was to insulate the treasuries of the new States from financial ruin by protecting them from suits to collect debts arising during the Revolutionary War. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, n.1 (1959); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 151 (1984). Second, it recognizes and respects that the power to tax, and thus accumulate a treasury for the use of its citizens, is basic to a state's sovereignty. *Bode v. Barrett*, 344 U.S. 583, 585 (1953). This test safeguards against federal interference with that important attribute of state sovereignty. Finally, this is an objective test. It permits the lower courts to determine whether a judgment against an entity, is essentially a judgment against a state, by an examination of several objective factors. *Edelman*, 415 U.S. at 663. These include the presence of statutory language protecting the state from judgments against the entity, the ability of the entity to raise its own funds and be self-sustaining, whether by statute a state is obligated to appropriate funds to the entity, and whether insurance is available to pay a money judgment. By providing the lower courts with an objective test their task is made easier. An objective test is especially important when examining a Compact Clause entity. Bi-state or multi-state entities are subject to judicial review in more than one state, and an objective standard will reduce the likelihood of conflicting decisions by the lower courts.

Respondent (and its amici) suggest that an alternative approach, concerning indicia of state control over an entity, should be used to determine Eleventh Amendment status. This approach looks at the political environment and interaction between the states and the entity and tries

to ascertain whether the entity is autonomous or subject to state control. It also requires the lower courts to examine the political processes of the states with all of its subtleties and it requires an examination of the political interplay between the Governors and legislatures of the states and the commissioners and other employees of the agency. This analysis invites confusion and inconsistent lower court decisions as the courts are forced to evaluate subjective factors; it provides no certainty, especially when multi-state entities are involved.

Respondent also directs certain other criticisms against the "impact on state treasury test" that are without merit and which we will briefly address. They have argued that the Port Authority's money is actually the states' money. In effect, they argue that the Port Authority is an alternative depository for state funds or a branch of the state treasury. This cannot be accurate as neither state, independently, can control those funds. Neither New York nor New Jersey can unilaterally use Port Authority funds for a general state purpose. If one of the states had a budget shortfall it could not, on its own, use Port Authority funds to make up the shortage. In reality, the Port Authority/PATH's money is its own and not available for use by a single sovereign state.

Respondent has also argued that a judgment against PATH could impact the state treasuries because, if the Port Authority/PATH does not have sufficient funds, the states may have to provide financial assistance and that will take funds away from other state projects. This is also a fallacious argument. The Port Authority/PATH is self-funding through user charges, rents, fees, tolls, etc.

Pet. Br. at 34-35, citing *Port Authority Comprehensive Financial Report* (Pet. for Cert. App. 59a-63a). Thus, state funds are not necessary to respond to a money judgment against the Port Authority/PATH. Further, Respondent's argument that an entity is entitled to Eleventh Amendment protection if a state appropriation to it results in a reduction of state funds for other projects, is overly broad. It applies to almost any entity, public or private. States appropriate funds to local governments and to help defray the cost of local government projects. If a judgment is entered against a city or a town the state might feel compelled to appropriate more funds to it, thus reducing money available to other state projects. Under the Respondent's argument this result renders the city or town protected by the Eleventh Amendment. But, this Court has "consistently refused to construe the Amendment to afford protection to political subdivisions, such as counties and municipalities . . . " *Lake Country*, 440 U.S. at 401. The Respondent's argument has even more absurd implications. It is possible that a private organization, such as a hospital or college, could suffer dire financial consequences as a result of a money judgment. If that institution, although private, was important to the citizens, a state might decide to provide financial assistance to it. This would make less money available for other state projects. Under Respondent's argument these private entities would be afforded Eleventh Amendment immunity. That result would be invalid on its face.

We argued in our opening Brief that any payments to the Port Authority/PATH, by either New York or New Jersey, were voluntary and, therefore, did not invoke Eleventh

Amendment protection. Neither state is required to appropriate funds to the Port Authority/PATH. No state appropriation to the Port Authority/PATH can be made unless first approved by the Governors of both New York and New Jersey, neither of whom are required to approve such appropriation. *Pet. Br.* at 37. PATH has commented, "How requiring the consent of the highest elected State official to such an appropriation . . . negates State agency status is something of a mystery." *Resp. Br.* at 33, n.16. The requirement that the Governor approve an appropriation to PATH does not make it a state alter ego any more than does the need for gubernatorial approval of appropriations to local governments make them state alter egos for Eleventh Amendment purposes. *See Karcher v. Kean*, 479 A.2d 403 (N.J. 1984) and *County of Oneida v. Berle*, 49 N.Y.2d 515, 404 N.E.2d 133, 427 N.Y.S.2d 407 (N.Y. 1980) (Governor has the right to approve or veto state appropriations, including those to municipal governments).

B. The "Impact On State Treasury Test" Is The Appropriate Analysis To Be Used Because The Effect Of The Proceedings In These Cases Is To Recover Money Damages.

Because of the reasons set forth in the preceding section, the "state control" approach should not be used as it relies on subjective factors that can lead to inconsistent results where multi-state entities are involved. Should this Court find that the "state control" approach does have a role in Eleventh Amendment jurisprudence,

it should still not be used in these cases.[3] Instead, the "impact on state treasury test" remains the appropriate test because of the nature of the relief sought.

Many lower courts have decided Eleventh Amendment cases by examining the entity itself. To do so, some courts have utilized the state treasury test, others have used the state control approach, and most have utilized a combination of the two. This haphazard approach to analysis is based on a fundamental misunderstanding of the Eleventh Amendment methodology mandated by this Court.

This Court's decisions demonstrate that a two-step analysis is necessary when determining whether an entity is entitled to a state's Eleventh Amendment immunity. This two-step analysis is only necessary where the instrument establishing the entity, in this case the bi-state Compact, does not disclose the intention of the states or Congress.

Step one requires the lower court to determine whether the consequences of a federal court judgment will primarily result in money damages or injunctive relief. This Court's decisions focus on the nature and effect of the requested judgment, and not simply on the entity. In *Ford Motor*, 323 U.S. at 464, the Court held,

> " . . . the nature of the suit as one against the state is *to be determined by the essential nature and*

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[3] Although an inappropriate standard in these cases, the "state control" approach reveals that the Port Authority/PATH is significantly autonomous from the compacting states and has historically been politically adverse to them. *Pet. Br.* at 27-30.

effect of the proceeding. And when the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity . . . " (emphasis added).

In *Pennhurst*, 465 U.S. at 101, n.11, the Court said,

"The general rule is that a suit against the sovereign if '*the judgment sought would* expend itself on the public treasury or domain, or interfere with the public administration,' or if the *effect of the judgment* would be 'to restrain the Government from acting or compelling it to act.'" (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted)) (emphasis added).

Only after the nature and effect of the proceedings is determined does the court proceed to the second step where it analyzes the agency and its relationship with the state. The analysis should be consistent with the effect of the judgment. If a money judgment is sought the relevant inquiry is whether the judgment against the entity will "have essentially the same consequences as a judgment against the State itself." *Lake Country*, 440 U.S. at 401. Only the "impact on state treasury" factors are relevant and necessary to this determination. On the other hand, if an injunction is sought to force the entity to act or stop acting in a certain way, the relevant inquiry is how the judgment will interfere with public administration. The "state control" factors are relevant to this determination because, if an entity is compelled to do or not to do something, the impact on the state will depend on whether the entity's actions are actually its own or whether the political process causes the state to so closely

control its conduct that the entity's actions are actually those of the state.

In these cases only a money judgment is sought. Accordingly, under this two-step analysis the "state control" approach is not relevant. Under "the impact on state treasury test" the Port Authority/PATH is not entitled to Eleventh Amendment protection as a judgment against PATH will not be paid from any state treasury. *See Pet. Br.* at 34-38.[4]

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[4] In an unrelated argument, The Council of State Governments asserts that PATH's Consent to Suit provision, N.J.S.A. § 7101 (Pet. for Cert. App. 57a) would "have been unnecessary if the respective States had not intended to confer sovereign immunity on their creature." *Amicus Br. of Council of State Governments* at 18-19. Whether the Port Authority/PATH possessed general sovereign immunity is a different question than whether it was a state entity entitled to invoke Eleventh Amendment immunity. Local municipal entities also possess sovereign immunity, and consent is required before suing them, but they cannot invoke the Eleventh Amendment. *See, e.g.*, N.J.S.A. § 59:1-1 *et seq.* (New Jersey Tort Immunity Act that codifies and modifies the "traditional doctrine of sovereign immunity," § 59:1-2, and applies it to any "public entity" that includes "the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State." § 59:1-3).

CONCLUSION

For the reasons set forth in our opening Brief, and in this Reply Brief, it is respectfully requested that the decision of the United States Court of Appeal for the Third Circuit in *Hess and Walsh* be reversed and remanded for further proceedings.

Respectfully submitted,

LAWRENCE A. KATZ
Counsel of Record for Petitioners

Of Counsel

JOSEPH A. COFFEY, JR.
COFFEY & KAYE
718 Two Bala Plaza
Bala Cynwyd, PA 19004
(610) 668-9800

PROFESSOR DAVID J. BEDERMAN
Gambrell Hall
Atlanta, Georgia 30322